

Native American Rights Fund

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November 4, 2005

Archaeology Task Force
Advisory Council on Historic Preservation
1100 Pennsylvania Ave., NW, Suite 809
Washington, D.C. 20004

Re: Comments on Working Principles for Revising the ACHP "Policy Statement
Regarding Treatment of Human Remains and Grave Goods."

Dear Archaeology Task Force Members:

I am writing in response to the Federal Register Notice, dated September 1, 2005, to provide comments on the Working Principles for Revising the Advisory Council on Historic Preservation's "Policy Statement Regarding Treatment of Human Remains and Grave Goods." These comments are respectfully submitted on behalf of my client, the Working Group on Culturally Unidentified Native American Human Remains ("Working Group"). The Working Group is composed of prominent Native American leaders who are experienced in grave protection and repatriation issues and who are especially concerned about the classification, treatment and disposition of unknown Native American dead (i.e., that category of Native American dead whose next-of-kin or cultural affiliation are currently unknown).¹ We appreciate this opportunity to provide comments to assist the Task Force in better understanding unique issues, values and law pertaining to Native American dead in the United States.

As we understand the Notice, the Task Force is presently considering whether and how to update the ACHP's 1988 "Policy Statement Regarding Treatment of Human Remains and Grave Goods" to guide decision-making by federal agencies in "questions

¹ Working Group members include: Wallace Coffee, Chairman, Comanche Tribe; Mervin Wright, Jr., Pyramid Lake Paiute Tribe; Peter Jemison, Seneca Nation NAGPRA Representative; James Riding In, historian and repatriation consultant to the Pawnee Nation; Suzan Harjo, President, Morning Star Institute; Ho'oiipokalaena 'auao Nakea Pa, Chairwoman, Native American Rights Fund; Kunani Nihipali, Hui Malama. Mr. Jemison is, of course, a member of the Advisory Council on Historic Preservation (ACHP) and will have his own additional comments in that capacity.

involving the treatment of human remains and funerary objects in the absence of Federal or State law circumscribing the treatment of human remains and funerary objects." Federal Register, Vol. 70, No. 169 (Sept. 1, 2005) at 52067. To that end, the Task Force is requesting comments on five Working Principles for use in revising the 1988 policy. Our comments on the Working Principles follow.

A. There Is Little or No Need For An ACHP Policy. As a preliminary matter, it is clear that the 1988 policy, which was aimed primarily if not exclusively at Native American dead, is outmoded by the passage of federal and state legislation and should be rescinded. In particular, the portion of the policy that places the interests in scientific research over the rights of next-of-kin flies in the face of the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. 3001 *et seq.* (NAGPRA) and statutes in all fifty States. However, we respectfully question the need to promulgate an ACHP policy for Native American dead. Existing Federal and State laws that specifically pertain to, or otherwise protect, Native American dead are comprehensive in most jurisdictions. Consequently, situations needing ACHP policy guidance may be rare because Federal and State laws already prescribe certain outcomes.

For example, all federal agencies and museums, except the Smithsonian Institution, are now subject to the policies, procedures and requirements of the Native American Graves Protection of 1990, 25 U.S.C. 3001 *et seq.* (NAGPRA). The Smithsonian Institution is subject to the repatriation provisions of the National Museum of the American Indian Act of 1989, 20 U.S.C. §§ 80q *et seq.* These federal laws set minimum human rights standards governing the classification, treatment and disposition of Native American dead who are in the possession of federal agencies and museums and those Native American dead who will be found on federal or tribal land in the future. No ACHP policy can, or should, supplant or water down those minimum standards and requirements, nor create inconsistent federal standards regarding Native American dead.

In addition, many states have enacted laws since 1988 that specifically protect Native American graves and govern the disposition of disinterred Native American dead. Those laws which were in effect as of 1991 are referenced and summarized in the following sources: H. Marcus Price III, *Disputing the Dead: U.S. Law on Aboriginal Remains and Grave Goods* (Univ. of Missouri Press, 1991), pp. 41-115 (identifying 27 state laws as of 1989 that specifically pertain to Native American dead and burials; and other additional laws that provide extensive protections for Native American dead under general desecration and cemetery laws); David J. Harris, Note, "Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains," 39 Wash. L. J. Urb. & Contemp. L. 195, 215, n. 105-108 (1991) (As of 1911, 8 states prohibited the display or sale of Native American human remains; 7 states banned future collections of dead Indians; 17 states specified procedures for newly found remains; 9 states controlled the acquisition of human remains primarily by permit, and nearly all states have general laws that specify who has burial rights and responsibilities, describe what is to be done with unclaimed bodies, and criminalize grave robbing, grave

tampering, and unauthorized exhumation²); Catherine B. Yalung and Laurel I. Wala, "Statutory Survey: A Survey of State Repatriation and Burial Protection Statutes," 24 Ariz. St. L. J. No. 1 (Spring 1992) at 419-433 (Surveying repatriation and burial protection statutes in 17 states). Consequently, very little room is left for policy guidance.

B. Additional Working Principles Are Needed To Address Native American Concerns. In those narrow situations where no law governs the classification, treatment and disposition of Native American graves and burials, three additional Working Principles should guide the development of any ACHP policy to assist federal agencies in the classification, treatment and disposition of Native American dead.

1. *Any Policy Concerning the Classification, Treatment and Disposition of Native American Dead Should be governed by Native American human rights; and those Human Rights take Precedence over Interests in Scientific Research.* This principle was adopted in the Report of the Panel for a National Dialogue on Museum/Native American Relations (Feb. 28, 1990) (Principles 2-3); and the Panel Report provided the framework for the NAGPRA legislation. See, Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," 24 Ariz. St. L. J. No. 1 (Spring 1992) at 57-58, 487-500. The need to recognize and protect Native American human rights with respect to the classification, treatment and disposition of Native American dead is of the utmost importance given the history of mistreatment of Native American dead in the United States. There is no question that scientific research done at the expense of human rights is inherently immoral. See, e.g., Robert J. Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, Inc., 1986). That mainstream society cannot abide such conduct is well-illustrated by laws in nearly every state that carefully regulate the medical or scientific use of dead bodies and permit such research only under carefully prescribed conditions involving informed consent by the deceased or next-of-kin, such as those conditions, for example, that are prescribed in the Uniform Anatomical Gift Act (UAGA).³ All too often in American history the human rights of Native Americans were subservient to non-Indian scientific interests, giving rise to serious Equal Protection problems of disparate racial treatment that have been particularly acute in matters respecting the treatment of the dead. See, Trope and Echo-Hawk, *supra*, 24 Ariz. St. L. J. at 38-43 (and citations therein).

2. *All Native American dead are entitled to a decent burial.* The mainstream social principle that every person is entitled to a decent burial is taken for granted by most Americans. That belief is shared by Native Americans as well. Their sensibilities are expressed in the attached Resolution No. ABQ-03-068 (Nov. 21, 2003) of the National Congress of American Indians (NCAI) which is composed of over 250 tribal

² This latter category of statutes may not be directly applicable to skeletal remains, but do illustrate the deeply-embedded mainstream social values and principles that guarantee a decent burial to each person. As argued *infra*, these mainstream values and protections should be extended to Native Americans.

³ As of 1990, UAGA laws are in effect in: Alabama, Arizona, Arkansas, California, Connecticut, Georgia, Hawaii, Louisiana, North Dakota, South Dakota,

governments. According to the Resolution, disposition of Native American human remains, including culturally unidentifiable Native American dead, "must be made by the appropriate Tribes and Native Hawaiian organizations in concert with the group's customary traditional practices, wishes and beliefs" and those dead should be "speedily repatriated to Native peoples in accordance with procedures to be determined by contemporary Native American groups" for disposition without further scientific study and at government expense. The NCAI statement should be incorporated into the ACHP policy and Working Principles, because the time is now long-overdue for our Nation to take into account the needs and values of its indigenous peoples in developing American law and social policy, especially when their fundamental rights and sensibilities are affected.

Furthermore, the principle that all persons are entitled to a decent burial is embedded in the laws and policies of all 50 States and the District of Columbia that guarantee a decent burial for every person, including paupers, strangers, prisoners, unclaimed dead, and persons who die without any next-of-kin. The fundamental social values which underlie those laws should be applied to Native American dead as a simple matter of equal protection of the laws and inform, if not control, ACHP policy on this sensitive subject. Thus, where no other law is directly applicable, ACHP should look to the general statutes that guarantee a burial to inform ACHP's proposed policy with respect to Native American dead and respect the mainstream values and sensitivities of America's Native peoples. Those laws, which are summarized below, provide the appropriate policy backdrop because they firmly establish that a proper burial for the dead is a deeply engrained social norm that is widely held in mainstream American society. Federal policy should reflect widespread social norms, including Native American norms, in this sensitive area and not serve to exclude Native Americans from widely held values and protections enjoyed by Americans of other races. Otherwise, the policy would be seen as racially discriminatory and not in keeping with trust responsibility owed to Native Americans by the Federal Government. Section 106 of the National Historic Preservation Act was not intended to, nor can be relied upon to, deny Native American communities the same legal and social protections afforded to other Americans in matters respecting the dead.

For the above reasons, when no other federal or state law controls the disposition of disinterred Native American dead, ACHP policy should guarantee a decent burial for Native American dead. The principle that every person is entitled to a decent burial originated in American common law. *See*, Percival E. Jackson, *The Law of Cadavers and of Burial and Burial Places* (New York: Prentice-Hall, 1950) at 30-40. Statutes in every state codify that principle. ACHP policy can be derived from the following state laws that guarantee a decent burial for all persons:⁴

⁴ Many States listed below have laws that specifically pertain to Native dead, unmarked graves or have general statutes which afford Native dead significant protection. The statutory survey presented here simply identifies general states laws that guarantee a burial for every person. Such laws should inform federal policy with respect to the disposition of Native dead in those narrow circumstances when no other state or federal law applies to their disposition.

Alabama: Impoverished or unclaimed inmates, patients and unidentified bodies will be buried at public expense. ALA. CODE § 22-19-22 (2005). In the case of abandoned cemeteries, Sections 11-47-60 *et seq.* require the reinterment of human remains in a suitable cemetery.⁵ Dead Indians disinterred from burial places are at minimum entitled to the same consideration by federal agencies as part of their Section 106 compliance.

Alaska: The state pays for the proper burial of any person unable to pay for burial. ALASKA STAT. §12.65.025 (Michie 2004). This policy should be adopted by federal agencies to ensure that deceased Alaska Natives disinterred from burial places are granted a proper reinterment.

Arizona: There is a statutory duty to properly bury dead bodies, including indigents, and it is a crime to disinter or mutilate the dead. ARIZ. REV. STAT. §§ 11-303, 36-804, 36-831, 36-861 (Michie 2004). When cemeteries are vacated, Section 9-451 requires unclaimed remains to be relocated to a proper cemetery. These policies should be applied by federal agencies as part of their Section 106 compliance to afford reinterment for any dead Indian disinterred from any burial place in Arizona.

Arkansas: It is a crime to abuse a corpse; and unclaimed bodies must be properly buried after use by the University of Arkansas. ARK. CODE ANN. §§ 5-60-101, 20-17-708 (Michie 2005). Upon abandonment of a cemetery, human remains must be relocated to a proper cemetery. *Id.* §20-17-905. These policies should be applied by federal agencies as part of their Section 106 compliance to ensure that any deceased American Indian disinterred from any burial place in Arkansas is afforded proper reinterment.

California: State law prohibits the deposit of human remains in any place except a cemetery. CAL. HEALTH & SAFETY CODE § 7054.1 (West 2005). Where no person is found to take responsibility for the proper burial of indigents, the duty devolves upon the coroner at county expense. *Id.* §§ 7100, 7104. These policies support decisions by federal agencies to guarantee proper reinterment of any deceased Native Americans disinterred from any burial place in California as a part of Section 106 compliance.

Colorado: The county where a deceased indigent or welfare recipient resided shall pay for burial. COLO. REV. STAT. § 26-2-129 (2005). When human remains in abandoned cemeteries are removed, they must be reinterred in another cemetery. *Id.* §25-1-658. These policies support decisions by federal agencies to grant disinterred Native dead a proper reinterment.

Connecticut: The town in which deceased patients or indigents are found is responsible for their proper burial. CONN. GEN. STAT. § 17b-131 (2005). Even human remains

⁵ In discussing the laws which permit exhumation in *The Law of Cadavers, supra*, Jackson states at 106-122 that exhumation "is abhorrent to custom, sentiment, and the law" but allowed in limited "circumstances of extreme exigency" arising from reasons of public interest (such as criminal prosecutions) or private purposes (such as kin requesting to move the remains to a more suitable place of burial). However, exhumation simply for scientific research is not listed by Jackson as one of the "circumstances of extreme exigency" that justify exhumation of a body once permanently buried.

subjected to scientific use must be properly disposed of under Section 19a-270(a). These policies mandate that any disinterred Native dead are entitled to a proper burial.

Delaware: Indigents and unclaimed bodies are buried at public expense. DEL. CODE ANN. TIT. 31 § 110, TIT. 29 § 4711 (2005). Disinterment must be accompanied by reinterment. *Id.* TIT. 16, § 3159. The same considerations should pertain to disinterred Native dead.

District of Columbia: Bodies must be properly buried, even after medical use (D.C. CODE ANN. § 3-205 (2005)); and cemeteries must provide lots for the burial of strangers and indigents (*Id.* § 43-102). Trafficking in human body parts and grave robbing is illegal. *Id.* §§ 7-1501.01, 22-3303. These same policies can be relied upon by federal agencies under Section 106 to guarantee a proper burial for Native dead according to proper specifications provided in Section 43-122.

Florida: Accidentally discovered dead are turned over to a medical examiner if less than 75 years old and the State Archaeologist must notify kinship community members to determine the proper disposition of older remains. FLA. STAT. ANN. § 872.05 (2005).

Georgia: The state buries indigents and unclaimed dead at public expense.. GA. CODE ANN. § 36-12-5 (West 2005). Any dead studied for medical education purposes must be decently interred by the school after use. § 31-21-23. Dead bodies and human remains of American Indians may not be put on public display except with the express consent of lineal descendants of the deceased or in their absence the Council on American Indian Concerns. § 31-21-45.

Hawaii: After bodies have been properly used for medical education, they must be properly buried or cremated (HAW. REV. STAT. § 711-1107 (2004)); indigents, unclaimed bodies and welfare recipients are buried at public expense (§§ 346-15, 27-1). State law guarantees that all persons be buried, and this policy should be applied by federal agencies to Native Hawaiians.

Idaho: Unclaimed bodies and the poor are to be decently buried by the coroner. IDAHO CODE §§ 31-2802, 31-1505 (Mickie 2005). The same should pertain to disinterred Native American dead, otherwise federal policy under the NHPA would violate the public policy of the State of Idaho as expressed in the above statutes.

Illinois: Before a cemetery is abandoned, the removal and reinterment of all human remains is required. 765 ILL. COMP. STAT. 830/1 (2005). Neglected graves must be restored and cared for by the county. 55 ILL. COMP. STAT. 70/1, 70/2 (2005) Though the bodies of institutionalized indigents to be buried at public expense may be used for medical education and scientific purposes when friends or relatives do not first request burial, the bodies must be properly buried or cremated after use. 410 ILL. COMP. STAT.

510/1.⁶ Where no other state law applies, the policies which underlie these statutes should inform federal policy concerning the disposition of Native American dead.

Iowa: Bodies properly received for scientific uses must be properly cremated or buried after use (IOWA CODE § 142.8 (2005)); ancient remains must be reinterred when discovered in a cemetery established for that purpose (§ 263B.7-8); and hospitals must bury patients at state expense when necessary (§ 225.33). Any NHPA policy affecting deceased Native Americans in this State should adopt the burial policies of these statutes when no other statutes apply.

Kansas: The coroner will properly bury an unclaimed body at county expense (KAN. STAT. ANN. § 22a-215 (2005)); and the county treasurer must properly bury welfare recipients (§ 39-713(d)); and bodies used for scientific purposes must be decently buried after use (§§ 65-902(b) to 904). Federal NHPA policies affecting the disposition of Native American dead in Kansas should be consistent with these laws when no other statute applies.

Kentucky: The coroner is responsible for burial of unclaimed bodies when relatives cannot be located (KY. REV. STAT. ANN. § 72.450 (Michie 2005)); when bodies are used for scientific purposes, they must be properly buried after use (§ 311.340); and when cemeteries are abandoned, the dead must be reinterred in another cemetery (§§ 381.730 to 770). Even the bodies of executed criminals must be decently buried by the State. *Id.* §§ 431.250 to 270. When no other law applies the foregoing statutory policies should be adopted by federal agencies to ensure that deceased Native Americans disinterred in Kentucky are guaranteed a proper burial.

Louisiana: Every dead body which has been dissected shall be properly buried or cremated within a reasonable time. LA. REV. STAT. ANN. § 8:651 (West 2005). Disposition of human remains anywhere but a cemetery is prohibited. § 8:652. Any authority in charge of human remains is responsible for their interment. § 8:661. Paupers must be buried at state expense, with organ donations allowed in the absence of objections by relatives. § 33:1565. Where no other federal or state law pertains, these policies support decisions by federal agencies under the NHPA to grant disinterred Native American dead a proper burial in Louisiana.

Maine: Every body within the state shall be decently buried or cremated and deposited in a proper cemetery or mausoleum (ME. REV. STAT. ANN. TIT 13 § 1032 (West 2005) and bodies removed from improper burial structures must be reinterred (TIT. 13 § 1349). Even bodies which have been used for scientific purposes must be decently buried. TIT. 22, § 2886. All deceased persons must be decently buried in Maine.

Maryland: When next of kin cannot be located, "any other person willing to assume the responsibility" for burial may dispose of the dead, otherwise the state will assume that

⁶ Disinterred Native Americans are not properly within the purview of statutes of the above kind that allow scientific study since they were not "institutionalized" in a prison or mental hospital or similar state institution, and they or their relatives never gave consent for scientific study of their remains in life.

responsibility. MD. HEALTH CODE TIT. 7, § 7-410(c)(7), (e) (2005). Remains in burial sites or abandoned cemeteries must be reinterred. TIT. 16, § 119, Tit. 10, §10-402(d).

Massachusetts: Bodies of institutionalized persons and executed criminals are buried at public expense but may be used for anatomical scientific unless they are veterans or persons who expressed wishes to the contrary. MASS. COMP. LAWS, Ch. 113, §§ 2, 6 (2005). The state will bury indigents, aged and welfare recipients. Ch. 118A, § 7.

Michigan: Bodies in abandoned cemeteries must be reinterred (MICH. COMP. LAWS § 128.31); unclaimed bodies distributed for scientific use must be properly buried after use and unclaimed bodies not so used must be properly buried (§§ 333.2655, .2678, .2658). Burial is contemplated in all instances in Michigan. Any federal NHPA policy regarding the disposition of American Indian remains in Michigan should be comport with that State's policy expressed in the foregoing statutes.

Minnesota: Equal respect must be given for all human remains, including unidentified human remains. MINN. STAT. § 307.08 (2005). The State's Indian Affairs Council is involved in decisions pertaining to the disposition of Indian skeletal remains by turning them over to appropriate Indian tribes for disposition. *Id.* §

Missouri: The coroner is responsible for the burial of unclaimed bodies (MO. REV. STAT. § 58.460 (2005)); and institutional officials are responsible for the proper disposition of paupers in their care at public expense (§ 194.150) but the use of their remains by science is first permitted (§ 194.160); and otherwise any person will be buried at county expense as may be determined by a county court (§ 205.620).

Mississippi: Institutionalized unclaimed and patient dead may be used for anatomical science but must be decently buried afterwards (MISS. CODE ANN. § 41-39-1 (2005)); paupers and strangers must be properly buried by the county in which they are found (§§ 43-31-27, -29, -31).

Montana: Federal policy should comport with Montana's mandate that unclaimed bodies are decently buried by the coroner at public expense under MONT. CODE ANN. § 35-20-209 (2005).

Nebraska: Paupers are properly buried by the county. NEB. REV. STAT. § 68-114 (2005). The bodies of deceased institutionalized persons are buried at public expense but may first be subjected to anatomical study. §§ 71-1002 to -1007. Abandoned cemeteries, including American Indian burial grounds, must be cared for by the county. § 12-805. Nebraska contemplates burial for all persons.

Nevada: Every dead body lying within the state, or the dissected remains thereof, shall be decently buried (NEV. REV. STAT. § 451.020 (2004)) at public expense if necessary (§§ 259.180; 451.025). This policy applies to disinterred American Indian remains who must be reinterred following examination. § 383.150. Federal policy concerning the

disposition of dead Native Americans should comport with Nevada policy embodied in the foregoing statutes, when no other statute applies.

New Jersey: Human remains from abandoned cemeteries must be reinterred. N.J. STAT. ANN. § 40:60-25.39 (West 2005) Unclaimed remains are given a decent and proper burial at county expense. § 40A:9-49. These goals should be adopted by federal policy for disinterred Native American remains found in New Jersey.

New Mexico: The State buries indigents and welfare recipients. N.M STAT. ANN. §§ 24-13-1, -2 (Michie 2005). The county buries unclaimed remains no less than 30 days after it has determined that they are unclaimed. §§ 24-13-1, 23-12A-3.

New Hampshire: Abuse of a corpse is unlawful. N.H. REV. STAT. ANN. § 644:7 (2005). Indigent inmates, aged, welfare recipients, paupers are buried at public expense. §§ 167:11, :13.

New York: Except in cases where the right to dissect is expressly provided for by law, every body of a deceased person in the State of New York is to be decently buried within a reasonable time after death. N.Y. PUB. HEALTH §. 4200 (McKinney 2005).

North Carolina: Unclaimed bodies must be properly buried even though they may be used for anatomical study beforehand. N.C. GEN. STAT. § 130A-415 (2005).

North Dakota: The statutory duty to bury the dead devolves upon specified individuals and then ultimately upon the county (N.D. CENT. CODE § 23-06-03 (2005)); failure to bury within a reasonable time is punishable (§§ 23-06-05, -06). All bodies will be buried and that will be done by the State if necessary. §§ 11-19.1-15, 12-45-05. Remains removed from abandoned cemeteries must be reinterred. § 23-21-02.

Ohio: Unclaimed bodies or bodies of tramps may be used for anatomical study followed by a decent burial at state expense. OHIO REV. CODE ANN. §§ 1713.34, .36, .38 (2005).

Oklahoma: Bodies of inmates and institutionalized persons are buried at state expense, but may first be subjected to anatomical study. OKLA. STAT. TIT. 8, §§ 87, 88; TIT. 63, § 97 (2004). There is a statutory duty to bury within a reasonable time. TIT. 21, § 1152. Refusal to inter on account of race is prohibited. TIT. 8, § 31.

Oregon: Unclaimed or indigent bodies may be used for anatomical study but must be decently buried. OR. REV. STAT. § 97.170 (2003).

Pennsylvania: The county in which the body lies is responsible for burial. 16 PA. CONS. STAT. § 2166 (2005). The state will bury institutionalized persons. 50 PA. CONS. STAT. § 4424 (10).

Rhode Island: Unclaimed bodies and inmates are buried at state expense. R.I. GEN. LAWS §§ 23-18.1-1, 42-56-23 (2004).

South Carolina: Unclaimed and indigent dead may be studied before burial at public expense. S.C. CODE ANN. §§ 17-5-590, 44-43-530 (2004).

South Dakota: Indigent dead are buried by the county. S.D. CODIFIED LAWS §§ 28-17-1, -2 (Michie 2005). Dissection may be done only when authorized by the deceased in life, by the spouse or next of kin (§§ 34-26-3, -4) and the remains must be decently buried afterwards (§ 34-26-11).

Tennessee: Paupers and indigents are buried at public expense. TENN. CODE ANN. §§ 5-9-311, 38-5-118 (2005).

Texas: The county shall bury indigent dead. TEX. GOV'T CODE ANN. § 694.002 (Vernon 2005). The state will bury inmate dead who may be studied prior to burial. § 501.015. The law contemplates that remains disinterred from a cemetery be reinterred. § 711.004

Utah: Cities bury their indigent dead. UTAH CODE ANN. § 10-8-74 (2005). Counties buried unclaimed dead, unless delivered for anatomical study in which case they must be buried in a timely fashion. § 26-4-25.

Vermont: Burial of the aged, blind, and welfare recipients is done by the state if necessary. TIT. 33, §§ 3101 *et seq.*

Virginia: Unclaimed dead are buried by the county where death occurred (VA. CODE ANN. § 32.1-288 (Michie 2005)); and remains from abandoned cemeteries must be reinterred in another cemetery (§ 57-36).

Washington: Unclaimed remains are buried by the state, but may be studied prior to burial unless the decease requested otherwise. WASH. REV. CODE §§ 68.50.220, .060, .070 (2005). No body may be disposed of in any place except a cemetery. § 68.50.130.

West Virginia: All aspects of burial, interment and relocation of abandoned cemeteries are governed by W.VA. CODE ANN. §§ 16-5-21 to -23, 61-8-14, 37-13-1 (2005).

The above laws illustrate that the principle that all persons are entitled to a decent burial is widely held and provide ample support for an ACHP policy that effectuates that social norm for Native American dead. We request that this principle be included as a Working Principle for revising ACHP policy. Since this principle embodies widespread norms deeply held by the public at large and by the Native American community, it would be intolerable for ACHP to sanction any policy that eschews this principle and fails to accord a decent burial for Native American dead.

3. *The ACHP Will Consult With Indian Tribes and Native American Leaders In Developing Any Policy That Affects the Classification, Treatment and Disposition of Native American Dead.* This principle should be added to the Working Principles for several reasons. First, we strongly object to any policy affecting the classification,

treatment and disposition of Native American dead that is written exclusively by and for non-Indian archaeologists. Plainly, archaeologists may have a conflict of interest if their goal is to retain and study Native American dead and prevent reinterment for professional and personal financial gain. This conflict of interest precludes them from embracing the social norms expressed by the above laws, which are in effect in all jurisdictions, and from respecting mainstream Native American norms and values that are opposed to their own professional and personal financial goals. Second, the Federal Government, including the ACHP, has a trust responsibility to Indian tribes and Native Americans to act in good faith as a fiduciary in their best interests. The federal trust obligation is implemented at minimum through meaningful consultation in any significant matter that affects Native American interests. Consequently, we request that ACHP work directly in consultation with Native American representatives in developing any policy respecting Native American dead. We must insist in our own voice to speak for ourselves through our leaders, and not be represented by archaeologists on the Archaeology Task Force in this important matter.

C. Comments on the proposed Working Principles. Before we address the Working Principles, we offer two preliminary observations. First, we are confused about the statement in the Notice that the proposed policy "would not be bound by geography, ethnicity or nationality; it would apply to the treatment of all human remains encountered in Section 106 review." Federal Register at 52067. One policy for all races and cultures may not necessarily be workable when groups like Native Americans have specific and widespread beliefs and practices about the classification, treatment and disposition of Native dead which should be taken into account and addressed. Those indigenous beliefs and practices may not necessarily be shared by other groups with different cultural outlooks pertaining to their dead. Any policy that affects Native American dead should take into account the matters discussed in this letter and be developed in consultation with Indian tribes and Native American leaders under the federal Indian trust responsibility. Second, we are concerned about any "balancing" of interests in this sensitive area when Native American dead are concerned unless Native Americans are involved on a decision-making level during the "balancing." In the past, such "balancing" was done exclusively by non-Indian archaeologists and authorities. This resulted in the violation of Native American human rights in every tribal and Native American community in the United States and led to the passage of remedial laws such as NAGPRA and the new state laws to rectify abuses.

Many of the Working Principles are very positive. We recommend that Principle 1 include reference to the human and statutory rights of next of kin, kinship communities, Indian tribes and Native Americans which enjoy precedence over interests in scientific study, as mentioned above in this letter. The three Working Principles discussed earlier in this letter should be added to address Native American concerns.

Thank you for this opportunity to provide comments. Please do not hesitate to contact me or my clients (see note 1 *supra*) to discuss our comments in more detail or if we can provide further assistance.

Sincerely,

A handwritten signature in cursive script that reads "Walter R. Echo-Hawk". The signature is written in black ink and is positioned below the word "Sincerely,".

Walter R. Echo-Hawk
Attorney for Working Group on Culturally Unidentified Native American Human
Remains

cc: Working Group members



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #ABQ-03-068

TITLE: NAGPRA and Unidentified Native American Ancestral Human Remains.

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Harold Frazier
Cheyenne River Sioux Tribe

MIDWEST
Norman Adams, Jr.
Bois Forte Band of Chippewa Indians

NORTHEAST
Kevin Seneca
Seneca Nation

NORTHWEST
Ernie Stensgar
Coeur d'Alene Tribe

PACIFIC
Leslie Lohse
Paskenta Band of Nontlaki Indians

ROCKY MOUNTAIN
Geri Small
Northern Cheyenne Tribe

SOUTHEAST
Eddie Tullis
Poarch Band of Creek Indians

SOUTHERN PLAINS
Zach Pahmahmie
Prairie Band Potawatomi Nation

SOUTHWEST
John F. Gonzales
San Ildefonso Pueblo

WESTERN
Arlan Melendez
Reno-Sparks Indian Colony

EXECUTIVE DIRECTOR
Jacqueline Johnson
Tlingit

NCAI HEADQUARTERS
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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, Public Law 101-601, the Native American Graves Protection and Repatriation Act (NAGPRA) was passed into law in November 1990 and includes in Section 6 (25 USC 3003) a requirement that Federal agencies and Federally funded museums compile an inventory of their collections of identified and unidentified Native American human remains and associated and unassociated funerary objects that includes the geographical and cultural affiliation of the items; and

WHEREAS, the inventories and identifications were to be completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

WHEREAS, the inventories for Native American human remains and associated funerary objects, sacred objects and items of cultural patrimony were to be completed no later than five years after the date of enactment of the Act and made available to the NAGPRA Review Committee; and

WHEREAS, written summaries of the holdings and collections of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony were to be completed no later than three years after the date of enactment of the Act; and

WHEREAS, Federal agencies and museums must report the inventory of information regarding unidentifiable human remains to the Department Consulting Archeologist in the National Park Service, who in turn must provide the information to the NAGPRA Review Committee; and

WHEREAS, the NAGPRA Review Committee is responsible for compiling the inventory of culturally unidentifiable human remains in the possession or control of Federal agencies or museums and recommend specific actions regarding the disposition of these human remains; and

WHEREAS, any museum that fails to comply with the requirements of the Act may be assessed a civil penalty by the Secretary of the Interior for each violation of non compliance with the Act, including failure to complete the required inventories and summaries; and

WHEREAS, the National Park Service has not enforced the requirements for completed inventories and summaries from numerous agencies and institutions and a listing of identified and unidentified human remains is a critical element of the law; and

WHEREAS, the National Park Service of the United States Department of the Interior has not acted to finalize the Proposed Rule on the Disposition of Culturally Unidentifiable Human Remains published in the Federal Register on May 6, 2002; and

NOW THEREFORE BE IT RESOLVED, that the NCAI expects that the NAGPRA Review Committee and the National Park Service initiate enforcement of penalties for non-compliance by the Federal Agencies and museums that have failed to remit 1) inventories as required by law of Native American human remains both identified and unidentified and associated funerary objects and 2) summaries of the unassociated funerary objects, sacred objects and objects of cultural patrimony; and

BE IT FURTHER RESOLVED, that the NCAI expects the NAGPRA Review Committee and the National Park Service include in the Rules of the NAGPRA Disposition of Culturally Unidentifiable Human Remains, a final date and identify a process for the approval of extensions for the remittance of inventories and summaries of the holdings or collections of culturally unidentifiable remains and the associated funerary items; and

BE IT FURTHER RESOLVED, that the NCAI recommends to the NAGPRA Review Committee and the National Park Service the final date for the remission of inventories and, or summaries of unidentified human remains shall not be later than September 30, 2008 and that the approved extensions shall not be granted beyond September 30, 2010; and

BE IT FURTHER RESOLVED, that the NCAI endorses the recommendations of tribal leaders and Native participants made to the Secretary of the Interior adopted at the Symposium for the Disposition of Culturally Unidentifiable Native American Human Remains under NAGPRA on December 2, 2001 in Tempe, Arizona which asserted that the disposition of any type of human remains and funerary objects must be made by the appropriate Tribes and Native Hawaiian organizations in concert with the group's customary traditional practices, wishes and beliefs. Agreement was also reached on the following points.

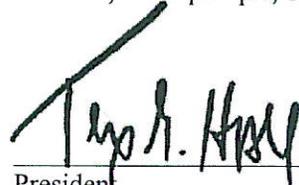
1. Native American human remains termed "culturally unidentifiable" are culturally affiliated to contemporary Native Peoples, including federally recognized Tribes, non-federally recognized Tribes, Native Alaska Peoples and Native Hawaiian People.

2. All Native American human remains and associated funerary objects, including those deemed "culturally unidentifiable" shall be under the ownership and control of contemporary Native Peoples.
3. All "culturally unidentifiable" Native American human remains shall be speedily repatriated to Native Peoples in accordance with procedures to be determined by contemporary Native American groups.
4. All scientific study of culturally unidentifiable" Native American human remains shall immediately cease.
5. The Federal Government shall be responsible for funding the costs of this repatriation.

NOW BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

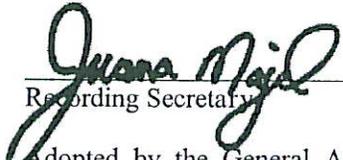
CERTIFICATION

The foregoing resolution was adopted at the 60th Annual Session of the National Congress of American Indians, held at the Albuquerque Convention Center, Albuquerque, New Mexico, on November 21, 2003 with a quorum present.



President

ATTEST:



Recording Secretary

Adopted by the General Assembly during 60th Annual Session of the National Congress of American Indians, held in Albuquerque, New Mexico, from November 17-21, 2003.